

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NICKOLAS R. CALL,

Defendant.

MEMORANDUM DECISION  
AND ORDER DENYING  
DEFENDANT'S MOTION  
TO SUPPRESS

Case No. 2:04-CR-00199 W

This matter is before the court on Defendant's Motion to Suppress. On June 16, 2004, the court conducted an evidentiary hearing on the motion. Defendant Nickolas R. Call ("Call") was present with his counsel, Robert Breeze. The government was represented by Stephen J. Sorenson. Following the hearing, the court ordered a transcript as well as supplemental briefing from the parties. After thorough review and consideration of the pleadings submitted by the parties and the testimony presented at the evidentiary hearing on the motion to suppress, the court enters the following memorandum decision and order.

BACKGROUND

The court finds the relevant facts as follows.<sup>1</sup> On October 30, 2003, at approximately 8:18 a.m., defendant Nicholas Call was involved in an automobile accident in American Fork, Utah. (Exh. 5 at 13.) Call, who was traveling westbound, crossed into eastbound lanes, struck

<sup>1</sup>Reference to the transcript of the evidentiary hearing conducted on June 16, 2004, will be cited as "Tr. at \_\_\_\_."

one vehicle on the road and struck a second vehicle in a parking lot. (Tr. at 9; Exh. 5 at 14.) Officer James Bevard of the American Fork Police Department responded to assist with the accident investigation. (Tr. at 9.)

Upon arriving at the scene of the accident, Officer Bevard observed that Call was the sole accident victim, and that Call remained inside the vehicle. (Tr. at 9.) Bevard, who was dressed in his police uniform, climbed into the back seat of Call's vehicle in order to assist the emergency medical personnel. (Tr. at 9.) Bevard testified that Call was slumped over between the driver's door and steering wheel, and as Bevard entered the vehicle, Call sat up and looked at him. Being concerned about Call's potential injuries, Bevard instructed Call to "hold still." (Tr. at 10-11.)

At that point, the emergency medical personnel approached Call's vehicle and Call directed his attention to them. Call told the emergency medical personnel that he had just left the hospital where he had received Ativan and Valium and the nurse had told him not to drive. (Tr. at 11.) Officer Bevard overheard the statements Call made to the emergency personnel. (Tr. at 9; Exh. 1 at 36.)

Call was extricated from the vehicle and transported to the American Fork Hospital. Officer Bevard approached Detective Falslev, who had also responded to investigate the accident, and informed Falslev that he believed, based on Call's comments to the medical personnel, that the accident was a possible DUI. Falslev released Officer Bevard from the accident scene and assigned him to respond to the hospital for further investigation. (Tr. at 11, 39.)

Bevard arrived at the hospital at approximately 8:46 a.m. (Tr. at 33.) Bevard described

the emergency room as a large square comprised of several ten by twelve foot "bays," with curtains for dividers, all of which opened to a central area. (Tr. at 13.) When Bevard arrived at the emergency room, the curtains into Call's bay were open. Bevard waited in the open bay area, at the foot of Call's hospital bed, while the treating physician "check[ed] him out." (Tr. at 12.) While standing in that location, and prior speaking to or asking any questions of Call, Bevard heard Call tell the treating physician "I was not supposed to drive, but I did anyway" and "I should not have [driven]." (Tr. at 12, 13; Exh. 1 at 37.) Without inquiry from Bevard, Call explained that he had come to the hospital early in the morning because he was suffering from withdrawals. (Tr. at 15.)

Officer Bevard described Call as being "incoherent at times, then angry, and combative at others." (Exh. 1 at 37.) In his report, Bevard also indicated that during this initial period in the emergency room "Call could not follow simple instructions and could not hold still." (Exh. 1 at 37; Tr. at 16.) Bevard said that "Call pulled his IV out two different times during fits of movement," and that he would "answer questions fine one minute and then the next minute he could not do anything but mutter." (Tr. at 16; Exh. 1 at 37.)

Officer Bevard began his exchange with Call at approximately 9:00 a.m. Although Bevard had previously observed Call to be incoherent at times, Bevard testified that at this point in time Call had been answering questions for the physicians without problems, so Bevard figured he had a "good stable person that [he] could deal with." (Tr. at 17, 34.) At approximately 9:02 a.m., using a standardized "DUI Report Form," Officer Bevard informed Call he was under arrest for driving under the influence. (Tr. at 17, 33; Exh. 1 at 37; Exh. 2.) The standard DUI Form, used by Bevard in this case, provides a blank space for the officer to

transcribe the subject's response to each question. Officer Bevard testified that he transcribed Call's responses to each question "verbatim" on the form. (Tr. at 19.)

Bevard began his questioning of Call with paragraph 10 of the DUI Form which reads, "Mr. Call, do you understand that you are charged with driving under the influence of alcohol and/or drugs with measurable amount of a controlled substance or metabolite in your body?" (Tr. at 19; Exh. 2 at 55.)<sup>2</sup> Bevard testified, and the DUI Form indicates, that Call responded "yes."

Bevard then proceeded to what he called the "admonitions" section of the Form and began with the "chemical test" section. The chemical test admonition begins by asking the subject to submit to a chemical test to determine the alcohol and/or drug content of the subject's body and then explains the consequences of a positive test result. (Exh. 2 at 55.) Bevard testified, consistent with the response he transcribed on the Form, that when asked to submit to a chemical test Call responded, "let me think about it." (Exh. 2 at 55; Tr. at 20.) Bevard gave Call a few minutes to "think about it," and then followed up with the "refusal admonition" which explains the penalties for refusing the test. Bevard testified, consistent with the response he transcribed on the Form, that Call responded, "okay, I will do it." (Tr. at 21; Exh. 2 at 55.)

Officer Bevard testified that Call's request for time to "think about it," coupled with Call's ultimate decision to submit to a chemical test after hearing the "refusal admonition," suggested to Bevard that Call was processing the information and trying to "pick the best thing to his advantage." (Tr. at 36.) Following Call's consent, Lieutenant Hale responded with blood

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<sup>2</sup>Bevard testified that he did not fill out the first page of the DUI Form (which describes items such as driver and vehicle identification, witnesses, and driving pattern or reason for contact) until after he had gone through the DUI questioning. (Tr. at 18, 33.)

draw equipment and obtained a sample of Call's blood for the test. (Tr. at 22.)

Following the blood draw, Bevard continued with the "Interview" section of the DUI Form. (Tr. at 22; Exh. 2 at 56.) The "Interview" section begins with an advisement of the Miranda rights. As Bevard read each line of the Miranda advisement, he initialed the corresponding line on the Form. Bevard then asked Call if he understood each of the rights, and Call responded "I do." (Tr. at 23; Exh. 2 at 56.) Bevard continued, asking "having these rights in mind, do you wish to talk to us now?" Bevard testified, and the Form indicates, that Call responded "yeah, I will." (Tr. at 23; Exh. 2 at 56.) The Miranda advisement was given to Call at 9:29 a.m. (Tr. at 22; Exh. 2 at 56.)

Bevard testified that at this point in time, Call appeared to be remorseful and "kind of in a low." (Tr. at 23.) According to Bevard, Call did not appear confused and seemed to be tracking the questions. (Tr. at 23.) Bevard testified that he did not have to ask these questions more than once, and Call appeared to be processing each question. (Tr. at 36.)

Following the Miranda advisement and waiver, Officer Bevard proceeded to ask Call the substantive interview questions listed on the DUI Form. Bevard testified: "At that point I will always tell the suspect that the state requires me to ask him a certain amount of questions, a lot of questions he and I both know the answers to. I am not trying to make him look stupid or belittled, but the state requires me to ask him." (Tr. at 23-24.) Bevard testified that Call responded, "okay." (Tr. at 24.) Officer Bevard then asked Call a series of questions such as, "Were you operating a vehicle?" "What street were you on?" and "What is today's date?" (Exh. 2 at 56.) Officer Bevard acknowledged that Call answered some of the questions, such as the "day of the week," inaccurately. Similarly, Bevard testified that Call "didn't know" the time of

day or what he had been doing during the last three hours. (Tr. at 24; Exh. 2 at 56.) However, according to Bevard, Call did not appear incoherent or traumatized to the extent that he was unable to understand and respond to questions. (Tr. at 24.)

The curtain to Call's emergency room bay was not drawn closed at any time while Officer Bevard was speaking with Call. (Tr. at 27.) Officer Bevard testified that while he was interviewing Call, he did not make any threats or any promises to Call, he did not do anything that was coercive or "heavy handed," and he did not talk in a loud tone or make any threatening gestures. Although Bevard was wearing a firearm, it was not drawn at any time. (Tr. at 28.)

Lieutenant Darren J. Falslev went to the hospital emergency room after he completed his investigation at the accident scene. (Tr. at 39; Exh. 3 at 5.) Falslev did not arrive until approximately 9:40 or 9:45 a.m. (Tr. at 39.) Upon his arrival at the hospital, and before Falslev approached Call, Officer Bevard informed Lieutenant Falslev that he had advised Call of his Miranda rights and Call had agreed to talk. (Tr. at 45.)

While Falslev was at the hospital, Call's mother and sister arrived followed by Call's girlfriend, Trista Emery. (Tr. at 44, 45.) Lieutenant Falslev testified that during this time doctors and medical staff were continuously entering and exiting Call's bay in the emergency room. Falslev testified that the officers "would always yield for the doctor" and exit the bay whenever medical personnel entered. (Tr. at 43.) Falslev visited with Call's mother and sister in the hall during those times when medical personnel were in Call's bay. During the course of the conversations in the hall, Call's mother volunteered information about Call's drug use and about his having stolen several items from their home, including a rifle and a shotgun. (Exh. 3 at 5; Tr. at 43, 45.)

Upon receipt of this information, Lieutenant Falslev contacted another officer and assigned him to check for the two missing firearms in local American Fork pawn shops. Within approximately ten minutes, the officer notified Falslev that he had located the rifle at a pawn shop. (Tr. at 45; Exh. 3 at 5.) After learning about the pawned rifle, Falslev proceeded to ask Call questions about the rifle and shotgun. (Tr. at 46-49; Exh. 3 at 5-6.)

Lieutenant Falslev told Call that he had talked with Call's mother and she had indicated that some items were missing from their house, including two firearms. Call's initial response was that he did not know anything about them. (Tr. at 46, 59.)<sup>3</sup> Falslev told Call that he had already located one of the firearms, and that it had been pawned in Call's name at a local pawn shop. (Tr. at 46.) Call then acknowledged that he had pawned the rifle, but maintained that he did not know where the shotgun was. (Tr. at 46.) Falslev testified: "It appeared, as I talked with Mr. Call, he was only going to tell me what he felt I already knew." (Tr. at 47.)

Lieutenant Falslev also asked Call about his drug use. (Tr. at 48.) Falslev referred to the chemical test and toxicology report obtained by Officer Bevard, which showed positive for cocaine and morphine, and asked Call if he had been doing "speed balls." (Tr. at 48.) Call responded, "yes." (Tr. at 48.)

Lieutenant Falslev testified as to Call's demeanor during the course of their

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<sup>3</sup>Falslev documented Call's denial of any knowledge of the firearms in his report by writing, "[Call] wouldn't tell me about the items." (Exh. 3 at 5.) In his testimony before the court, Falslev clarified that Call's actual response was "that he didn't know what I was talking about," which Falslev understood to be Call's way of answering the question without providing any information about the items. (Tr. at 59.) Falslev explicitly and repeatedly testified that at no time during the interview did Call ever refuse to talk or say that he did not want to talk. Rather, according to Falslev, Call demonstrated a willingness to talk but simply denied having any information on the subject. (Tr. at 59-62.)

conversations. Falslev testified that in the beginning Call had problems answering some questions, but "as time went on, you could tell he was thinking his way through things." (Tr. at 49.) Falslev acknowledged that when he arrived at the hospital, Call seemed "very incoherent" and could not sit up in bed without assistance. (Tr. at 51.) Falslev also testified that upon his arrival, Call would fail to understand questions and they would have to be repeated. (Tr. at 52.) By way of example, Falslev explained that when he asked Call for his girlfriend's last name, Call started talking about her phone number, and then was unable to provide a complete number. (Tr. at 49-50, 52.)

However, Falslev stated that when he was talking with Call about the firearms and drug use, Call appeared to be understanding. Falslev testified that Call "was thinking through it to the point where he knew he wasn't going to give me anything I didn't already know." (Tr. at 49.) Falslev testified that "the only time through the whole incident where [Call] didn't seem coherent is when I asked him about his girlfriend. Everything else he seemed right on track." (Tr. at 55-56.) Falslev testified that Call "was very much thinking his way through this process" trying to keep himself from divulging too much information. (Tr. at 50.)

Lieutenant Falslev testified that during the course of his conversations with Call he did not make any threats or promises to Call. Similarly, Falslev did not raise his voice or "lose patience" with Call. (Tr. at 56.) Falslev questioned Call in the open bay area of the emergency room, with Call's mother, sister, and girlfriend present, and medical personnel frequently coming and going. (Tr. at 12, 13, 44-45, 53-54, 78.)

Call's girlfriend, Trista Emery, also testified at the hearing. According to Emery, Call was "completely incoherent" and "incoherent the whole time." (Tr. at 75, 78.) Emery testified



that "everything [Call] said didn't make sense," and "as far as giving, you know, a normal sentence or anything, talking, anything that makes sense, by any means he was not there." (Tr. at 72, 80.)

Emery also testified that Call specifically and repeatedly told Falslev that he did not want to talk. (Tr. at 72.) According to Emery, Call kept saying "no, no, no, no, I don't want to talk about it." (Tr. at 74.) When asked how many times Call told the officers he did not want to talk, Emery testified: "That's all [he] kept saying the whole time." (Tr. at 73.) In addition, Emery testified that Call responded to some of Falslev's questions by saying, "I don't know, I don't know, I don't know." (Tr. at 75.)

Finally, Emery testified that during the entire time she was at the hospital she did not hear Call utter any sentence that made sense with the exception of Call saying "I don't want to talk" and "[my] shoulder hurt[s]." (Tr. at 80.) According to Emery, everything else Call said was incoherent. (Tr. at 80.) Emery testified that Officer Bevard "smacked Nick in the head trying to get him to talk." (Tr. at 73.) Emery testified that if the police officers reported or indicated that Call said he would be willing to talk to them, the officers would be lying. (Tr. at 79.)

Call also testified at the evidentiary hearing. Call is 24 years old, educated through the 11<sup>th</sup> grade, and is employed in construction. Call testified that remembered talking with Officer Bevard at the hospital and he remembered responding to Bevard's questions. (Tr. at 89.) Call testified that after talking with Bevard he was aware that he was under arrest. (Tr. at 90.)

With regard to his conversations with Falslev, Call testified that he did not want to talk to Falslev and that he told Falslev, "no, I won't talk." (Tr. at 87.) Call testified that he told Falslev at least ten times he did not want to talk. (Tr. at 88.) Call testified that his mother, sister,

girlfriend and/or medical personnel were in his room or around his bed while Falslev was asking him questions. (Tr. at 91.) Call never asked for any assistance in dealing with the officers and he never requested an attorney. (Tr. at 89-90.)

Call was charged with possession of a firearm by an unlawful user of or one addicted to a controlled substance (18 U.S.C. § 922(g)(3)), and with being in possession of a stolen firearm (18 U.S.C. § 922(j)). Call filed a motion to suppress the statements he made at the hospital on the date of his arrest, claiming that the statements were obtained in violation of Miranda. In support of his motion, Call relies exclusively on the claim that he invoked his right to remain silent and the officers failed to honor the invocation. See Def's Mem. in Support at 4-6.

#### DISCUSSION

The Fifth Amendment privilege against self incrimination is safeguarded after arrest by the mandatory warning procedures outlined in Miranda v. Arizona, 384 U.S. 436, 467-79 (1966). After giving Miranda warnings to a suspect in custody, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473-74. "[A] person's 'right to cut off questioning'" is central to the Fifth Amendment, and this right must be "scrupulously honored." Michigan v. Mosley, 423 U.S. 96, 103 (1975) (quoting Miranda, 384 U.S. at 474). To adequately invoke the right to remain silent and effectively cut off questioning, there must be a clear and unambiguous assertion of the right. See United States v. Rambo, 365 F.3d 906, 910 (10<sup>th</sup> Cir. 2004); see also Soffar v. Cockrell, 300 F.3d 588, 594 (5<sup>th</sup> Cir. 2002). The court considers the "entire context of the relevant statement" to determine whether the suspect made a "clear and unambiguous

assertion” of the right to remain silent. Rambo, 365 F.3d at 910; (citing United States v. Johnson, 56 F.3d 947, 955 (8<sup>th</sup> Cir. 1995)).

The testimony on the issue of whether Call was or was not willing to answer the officers’ questions was highly controverted. Both Emery and Call testified that Call repeatedly and expressly stated to Lieutenant Falslev that he did not want to talk. However, Bevard and Falslev testified that Call expressly agreed to talk, and that Call acted accordingly throughout by answering their questions with either substantive information or a denial of any knowledge. This contradictory testimony requires the court to make a credibility determination. After carefully considering the testimony presented at the evidentiary hearing and reviewing all of the evidence presented to the court, the court rejects Emery and Call’s version of events.<sup>4</sup>

Recognizing that the events in question occurred some time ago, the court finds it significant that both Bevard and Falslev filed reports within hours of the incident. In addition, the testimony of Bevard and Falslev was consistent with their reports. The credible evidence in

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<sup>4</sup>The court finds Emery’s testimony to be somewhat exaggerated and also contradictory. For example, Emery claims that Call was “completely incoherent” and that he was incoherent “the whole time.” (Tr. at 75, 78.) On the other hand, Emery testified that Call expressly and effectively communicated to the officers that he did not want to talk to them by saying, “I don’t want to talk.” Moreover, she claims Call was saying this “the whole time.” (Tr. at 73.) In other words, according to Ms. Emery, Call was both incoherent “the whole time” and also effectively communicating that he did not want to talk “the whole time.”

When asked on cross-examination, “So the whole time that you were at the hospital did you hear Mr. Call utter any sentence that made sense?” Emery responded, “No, besides no and I don’t want to talk, and that’s the only thing – and that his shoulder hurt.” (Tr. at 80.) However, Ms. Emery also testified that in response to some of Falslev’s questions Call would say “I don’t know, I don’t know, I don’t know.” (Tr. at 75.) This response contradicts the claim that Call made a clear assertion of his desire to remain silent. In addition, Call gave similarly contradictory testimony, at once asserting that he said, “no, no, I won’t talk . . . [a]t least ten times” (Tr. at 88) and at the same time recalling, “Yeah, I kind of told him to get lost,” accompanied by a twirling of his index finger.” (Tr. at 88.)

the record reveals that Officer Bevard did not confront Call with the DUI Form until Call appeared to be understanding and answering questions coherently. (Tr. at 17, 34.) Bevard asked Call if he understood that he was under arrest for DUI and Call responded, "yes." (Tr. at 19; Exh. 2 at 55.)<sup>5</sup> Bevard read Call each line of the Miranda advisement and Call verbally indicated that he understood. (Tr. at 23; Exh. 2 at 56.) When Bevard read the waiver portion of the Form, to determine if Call wished to waive his rights, Call orally responded, "yeah, I will." (Tr. at 23; Exh. 2 at 56.) Bevard testified that Call did not appear to have difficulty understanding these questions and he perceived that Call was processing the information. To support this perception, Bevard referred to Call's request for "time to think about" whether to submit to the chemical test and the fact that Call appeared to weigh his options after listening to the chemical test admonition and the refusal admonition. (Tr. at 36.)

When Falslev arrived at the hospital, Bevard informed Falslev that Call had waived his Miranda rights and agreed to talk. The credible evidence in the record suggests that Falslev and Call then engaged in several, brief conversations, and that much of the time Call denied any knowledge concerning the substance of Falslev's questions. In his written report, Lieutenant Falslev documented Call's failure to provide substantive responses by writing: "[Call] would not tell me about the items." (Exh. 3 at 5.) Defense counsel claims that this statement in Falslev's report demonstrates that Call invoked his right to remain silent. Def's Mem. in Support at 2, 5. The court disagrees. When asked about this statement in his report, Lieutenant Falslev repeatedly and explicitly testified, "[Call] didn't state he didn't want to talk about it, he stated he

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<sup>5</sup>Call testified that he remembered talking to Officer Bevard, and that after talking to Bevard he understood he was under arrest. (Tr. at 90.)


didn't know what I was talking about." (Tr. at 59-60.) "He didn't tell me he didn't want to talk about it, he said he didn't know where it was, he said he didn't know what I was talking about." (Tr. at 65.) Given these responses, Falslev deduced that Call was not going to give him any information, and Falslev transcribed that deduction into the written statement in his report. Falslev's testimony and written report, when considered in the appropriate context, do not suggest an invocation of the right to remain silent, but rather a denial of knowledge regarding the subject of Falslev's questions. See West v. Johnson, 92 F.3d 1385, 1403 (5<sup>th</sup> Cir. 1996) (holding detective's testimony that suspect said he "didn't want to tell us anything about it," was not an invocation of the suspect's right to remain silent, but rather a denial of involvement in the crime), cert. denied, 520 U.S. 1242 (1997).

In light of these facts and the relevant case law, the court concludes that Call failed to make a clear and unambiguous assertion of his right to remain silent. Accordingly, the officers' continued questioning of Call was not improper and Call's statements were not obtained in violation of Miranda.

Therefore, based on the foregoing and good cause appearing, IT IS HEREBY ORDERED that defendant's motion to suppress is DENIED.

DATED this 1<sup>st</sup> day of September, 2004

BY THE COURT:

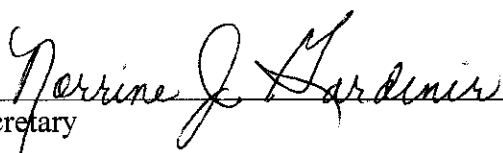
  
\_\_\_\_\_  
David K. Winder  
Senior District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 1<sup>st</sup> day of September, 2004, I served copies of the foregoing by United States mail, postage prepaid, and/or by inter-office delivery, addressed as follows:

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Robert Breeze  
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Secretary

jmr

United States District Court  
for the  
District of Utah  
September 1, 2004

\* \* CERTIFICATE OF SERVICE OF CLERK \* \*

Re: 2:04-cr-00199

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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